

[Securities Regulation Daily Wrap Up, TOP STORY—D.C. Cir.: SIFMA cries foul over temporary relief for municipal advisers, \(Aug. 18, 2020\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

The broker-dealer group asserts that the SEC's pandemic-related temporary relief for municipal advisers regarding direct placements of smaller municipal issuers' securities puts broker-dealers at a competitive disadvantage.

The Securities Industry and Financial Markets Association filed a petition for review in the D.C. Circuit alleging that a temporary order issued by the SEC to provide relief to municipal advisers during the COVID-19 pandemic unlawfully puts broker-dealers at a competitive disadvantage and ignores formal agency rulemaking procedures. SIFMA said via [press release](#) that it generally supports the SEC's efforts to provide targeted pandemic-related relief to market participants, but that the SEC's temporary conditional exemption (TCE) for municipal advisers "creates a host of negative consequences for not only other market competitors but also issuers and investors alike." The details of SIFMA's argument for vacating the TCE will likely be provided in later briefing in the matter, but some preliminary points can be inferred from SIFMA's press release announcing the petition for review and the group's prior public comments on an earlier SEC proposal ([Securities Industry and Financial Markets Association v. SEC](#), August 14, 2020); Order Granting a Temporary Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors, [Release No. 34-89074](#), June 16, 2020).

Temporary relief for municipal advisers. The TCE, issued June 16, 2020, provides an exemption from the registration requirements for broker-dealers under Exchange Act Section 15 regarding municipal advisers. The TCE is ostensibly part of the SEC's broader effort to provide targeted relief from various federal securities regulations to market participants due to the ongoing COVID-19 pandemic. More specifically, the TCE allows registered municipal advisers to solicit banks (and certain bank subsidiaries) as well as credit unions in connection with direct placements of securities issued by their municipal issuer clients. The TCE is effective from June 16, 2020 until December 31, 2020.

The TCE's purpose is to facilitate smaller state and local government issuances of municipal securities on the theory that many such entities are ineligible to participate in the Fed's [Municipal Liquidity Facility](#), which is designed to facilitate the purchase of debt issued by larger municipal issuers during the pandemic. As a result, the TCE, subject to numerous requirements, is an attempt to prevent smaller governmental entities from being shut out of the municipal securities markets while the pandemic continues.

The TCE imposes multiple conditions on municipal advisers who would invoke the relief. These conditions consist primarily of sets of written representations that emphasize institutional investors over retail investors. For example, a registered municipal adviser must obtain a representation from a qualified provider (such as a bank or credit union) that entity is a qualified provider as defined in the TCE. A registered municipal adviser also must make certain representations about its duties and obligations to a qualified provider in order to avoid confusion about the role the municipal adviser will play in a transaction, but the Commission's order said this requirement does not bar a qualified provider from engaging a broker-dealer.

Other requirements contained in the TCE: (1) clarify that a registered municipal adviser's exempt activities are limited to the scope of the TCE; (2) limit the aggregate principal amount of a transaction to \$20 million (i.e., transactions that would be excluded from the Fed's Municipal Liquidity facility); (3) fix a denomination floor of \$100,000 (i.e., to discourage resale of securities to retail investors); (4) limit the transfer of securities by a qualified provider to transfers to another qualified provided within the first year after a transaction; and (5) to

require a registered municipal adviser to satisfy the recordkeeping requirements contained in Exchange Act Section 15Ba1-8(a)(1).

Did the Commission dodge formal rulemaking? Based on SIFMA's press release, the industry group plans to argue that the Commission's TCE inappropriately skipped formal rulemaking steps largely in an effort to avoid having to potentially approve an earlier proposed exemptive order that would have achieved results similar to the TCE. The pre-pandemic [proposed order](#) sought public comment on a range of issues, including topics like whether the order should be limited to transactions of a particular size. The Commission said in the more recent TCE that it did not plan to move forward with the proposed exemptive order and instead would address the "unprecedented" and "exigent circumstances" affecting municipal markets via the TCE.

The Commission received 37 comments on the proposed order, including two from SIFMA. Moreover, SIFMA representatives met with SEC officials on at least six occasions regarding the proposed order. A representative of Commissioner Allison Herren Lee [met](#) with members of SIFMA's Municipal Securities Committee in February 2020. A representative from SEC Chairman Jay Clayton's office also [met](#) with SIFMA and other industry participants in January 2020. Meetings with other commissioners and/or their staff also included SIFMA representatives ([Commissioner Hester Peirce](#) in January 2020, [Commissioner Elad Roisman](#) in December 2019; the Director Office of Municipal Securities in [November](#) and [December](#) 2019).

In SIFMA's [most recent public comment](#), submitted in January 2020, the group responded to SEC staff requests for data showing that the proposed order would have a deleterious impact on the municipal securities market. Specifically, SIFMA cited data from the MSRB for the period January to December 2019 showing that 56 percent of transactions are for \$10 million or less. SIFMA also cited data for the same period from Securities Data Corporation showing that 36 percent of transactions are for \$5 million or less. SIFMA said it was "shocking" how many transactions could be entered without adequate transparency under the proposed order if there are no size limits on transactions.

In a [prior comment](#), submitted in December 2019, SIFMA argued that the proposed exemption lacked investor protections, did not ensure that securities would not be sold to retail investors, introduced a conflict of interest (i.e., municipal advisers' "salesman stake"), and undermined long-held SEC guidance about who must register as a broker-dealer. Said SIFMA: "Nowhere in the Proposed Exemptive Order does the Commission identify the purported market harm that it seeks to "fix" or any benefit that would inure to investors through exempting municipal advisors engaging in direct placements. Likewise, it fails to explain how issuers and investors are disadvantaged under the current regime that requires placement agents to be registered broker-dealers when placing municipal securities."

SIFMA's press release also suggested that the group will argue that the Commission failed to satisfy public interest requirements for issuing the order. For example, the Commission said in its order that the TCE "is consistent with the public interest and the protection of investors and is necessary or appropriate in the public interest, consistent with Sections 15(a)(2) and 36(a)(1) of the Exchange Act." SIFMA, however, asserted in its press release that the Commission failed to justify the TCE and, in particular, failed to show how the order furthers the public interest and is necessary or appropriate in the public interest. In SIFMA's first comment letter on the SEC's earlier proposed order, SIFMA had also characterized the proposal as "solution in search of a problem" that would ultimately force broker-dealers to compete with municipal advisers for the placement of municipal securities.

Constitutional standing. Although SIFMA and the SEC have yet to file any briefs in the matter, it seems plausible the SEC may argue that SIFMA lacks constitutional standing to bring the petition for review under Article III of the U.S. Constitution. SIFMA may be able to invoke multiple theories of standing but, based on the group's press release and public comments on the earlier SEC proposal, it appears the group may attempt to assert competitor standing.

For example, SIFMA president and CEO Kenneth Bentsen, Jr. said the following in the group's press release upon filing the petition for review: "The TCE creates an uneven playing field that exclusively benefits municipal advisors at the expense of more regulated broker-dealers, and ultimately we believe at the expense of issuers

and market transparency. The SEC in effect suspended SEC regulatory requirements for one type of business entity, at the expense of another." SIFMA's public comments on the SEC's proposed order also raised the prospect of increased competition between broker-dealers and municipal advisers.

The SEC recently argued unsuccessfully against competitor standing in a case that had challenged the validity of Regulation Best Interest. There, a group of investment advisers asserted Article III standing based on the theory that the new regulation unfairly aided broker-dealers, who being subject to a lesser standard of care than the fiduciary standard of conduct applicable to investment advisers, could nevertheless compete against investment advisers by also claiming to serve their client's best interest without having to distinguish how the standard of conduct for broker-dealers differs from that for investment advisers. The majority on a [Second Circuit panel](#) accepted the competitor standing theory, but the court ultimately upheld Regulation Best Interest on its merits.

The case is [No. 20-1306](#).

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